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In the Supreme Court of the United States

OCTOBER TERM, 1982

DON'T WASTE WASHINGTON LEGAL DEFENSE FOUNDATION, PETITIONER

v.

STATE OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of a decision that a state statute banning the transport for storage within the state, or the storage itself, of out-of-state, nonmedical radioactive wastes violates the Commerce Clause (Article I, Section 8, Clause 3) and the Supremacy Clause (Article VI, Clause 2).

1. In November 1980, the State of Washington, by voter initiative, enacted a statute (Initiative 383) prohibiting the transportation for storage within the State, or the storage itself, of nonmedical radioactive waste produced outside the State (Pet. Supp. App. A-22). The initiative also authorized the State to enter into a compact with other states to provide for the storage of such wastes (*id.* at A-22 to A-23).

The Hanford Reservation is a federally owned nuclear waste facility located in the State of Washington. The State leases 1,000 acres of the facility from the federal government, 100 acres of which the State, in turn, subleases to

respondent U.S. Ecology, Inc., a private operator of a low-level radioactive waste storage facility. The U.S. Ecology site is the only commercial facility in the United States that can store absorbed low-level radioactive liquids (Pet. Supp. App. A-21 to A-22, A-40 to A-42).

Following the enactment of Initiative 383, the United States, U.S. Ecology, and a number of other private parties connected with the nuclear industry in Washington filed suits in the United States District Court for the Western District of Washington challenging the validity of the statute under, inter alia, the Commerce Clause and the Supremacy Clause of the United States Constitution.[1] The district court struck down Initiative 383 on the grounds that it impermissibly interfered with interstate commerce (Pet. Supp. App. A-53 to A-63) and was preempted by federal law (*id.* at A-44 to A-52).

The Ninth Circuit affirmed (Pet. Supp. App. A-15 to A-35). The court of appeals first held (*id.* at A-26 to A-29) that Initiative 383 violated the Supremacy Clause because disposal of nuclear waste is governed by two federal statutes (the Atomic Energy Act of 1954, 42 U.S.C. (& Supp. IV) 2011 *et seq.*, and the Low-Level Radioactive Waste Policy Act, 42 U.S.C. (Supp. IV) 2021b *et seq.*), neither of which permits states to prohibit transportation or storage of out-

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[1]The State of Washington and various state officials were named as defendants. Petitioner, a nonprofit corporation affiliated with the sponsor of Initiative 383, was denied intervenor status by the district court, but was permitted to participate in the trial court proceedings as amicus curiae. Pet. 6-7. Although the court of appeals ruled (Pet. Supp. App. A-25 to A-26) that the district court erred in denying petitioner's motion to intervene, it held that no new trial was required because petitioner "was permitted to participate in the argument on the appeal from the order granting summary judgment, and its contentions were duly considered" (*id.* at A-26). Petitioner does not challenge that procedural ruling, but only the substantive aspects of the decision below. The State does not seek this Court's review of the decision below.

of-state waste before January 1, 1986 (and then only pursuant to interstate compact). The Court also found (Pet. Supp. App. A-29 to A-35) Initiative 383 invalid under the Commerce Clause because of the statute's discrimination against interstate commerce. In so ruling, the court specifically rejected the argument that the statute is exempt from Commerce Clause strictures as a "quarantine" measure (*id.* at A-34 to A-35).

2. The decision of the court of appeals is correct and is consistent with the prior decisions of this Court and the other courts of appeals. Further review by this Court therefore is not warranted.

a. Petitioner claims (Pet. 8-10) that the statute at issue here is a "quarantine" measure and that this case thus presents a question left open by the Court in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). There is no merit to this contention.

In *City of Philadelphia*, the Court struck down as violative of the Commerce Clause a New Jersey statute that prohibited the importation of waste generated or collected outside the State assertedly because such material presented a health and safety hazard. See 437 U.S. at 625-626. The Court rejected the State's quarantine argument, observing that there was no claim that "the very movement of [the] waste" itself was hazardous. *Id.* at 629.

An identical situation obtains here. The legislative scheme at issue itself dispels the notion (Pet. 8, quoting *City of Philadelphia* v. *New Jersey*, *supra*, 437 U.S. at 629) that "the very movement of waste into or through [the State] endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible." Initiative 383 prohibited only transportation for storage within Washington or the storage itself of out-of-state waste; it

permitted transportation through the State of outside waste for disposal elsewhere. Moreover, the statute allowed shipments of in-state waste across the length of the State, while banning shorter out-of-state shipments. See C.R. 18 at No. 10.[2] Initiative 383 thus plainly cannot be defended on the ground that it is a quarantine measure arising out of the need for immediate disposal of dangerous material. Rather, here, as in *City of Philadelphia, supra*, 437 U.S. at 629, the harm against which the statute is directed is that which arises after the waste's disposal in a storage site. But at that point "there is no basis to distinguish waste generated in Washington from waste generated in other states" (Pet. Supp. App. A-60; see 437 U.S. at 629). Accordingly, the "virtually *per se* rule of invalidity" announced in *City of Philadelphia, supra*, 437 U.S. at 624, for statutes that directly discriminate against interstate commerce is equally applicable here.[3] See also *Illinois* v. *General Electric Co.*, 683 F.2d 206, 213-215 (7th Cir. 1982), petition for cert. pending, No. 82-648 (invalidating as violative of both the Commerce Clause and the Supremacy Clause an Illinois statute prohibiting the shipment into the state of spent nuclear fuel for storage).

Furthermore, even assuming Initiative 383 is not *per se* invalid because of its facially discriminatory nature, both courts below correctly found (Pet. Supp. App. A-32 to A-33, A-61 to A-63) that the statute violates the Commerce Clause because its burden on commerce outweighs any local benefits achieved. See *Edgar* v. *Mite Corp.*,

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[2]The designation "C.R." refers to documents in the clerk's record, which comprised the record in the courts below.

[3]As the Court observed in *City of Philadelphia* v. *New Jersey, supra*, 437 U.S. at 626-627, it is irrelevant that a statute may not have an economically discriminatory purpose so long as its effect is to discriminate against articles of commerce from without the state.

No. 80-1188 (June 23, 1982), slip op. 18; *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As the court of appeals observed (Pet. Supp. App. A-32), while "the release of radioactive materials and emissions is inimical to the safety of the people of any state," the State of Washington has not explained "the manner in which local waste, transported and stored within Washington has superior safety and environmental virtues over waste produced elsewhere and similarly controlled by state regulatory measures."[4] Moreover, both courts below noted (*id.* at A-33; see also *id.* at A-63) that "[c]losing Washington's borders would significantly aggravate the national problem of low-level waste disposal." Accordingly, the courts below agreed that Initiative 383 not only directly discriminated against interstate commerce, but failed the *Pike* test as well.

b. The courts below also held Initiative 383 unconstitutional under the Supremacy Clause (Pet. Supp. App. A-26 to A-29, A-44 to A-52). This ruling too is plainly correct.

The Atomic Energy Act of 1954, 42 U.S.C. (& Supp. IV) 2011 *et seq.*, gave the Nuclear Regulatory Commission exclusive authority to regulate nuclear facilities and materials insofar as they present unique health and safety hazards, thus preempting state regulation of radiation hazards. See *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143, 1149 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972). The states therefore may regulate radiation hazards only insofar as the Act permits such regulation.

Section 274(b) of the Act, 42 U.S.C. (Supp. IV) 2021(b), permits the Commission to enter into agreements with states allowing them to assume certain regulatory functions

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[4]In this connection, the district court noted (Pet. Supp. App. A-62) that the State itself had concluded that, if properly regulated, nuclear waste can be safely transported. Less intrusive means to safeguard the public health thus were available.

such as licensing (Washington has such an agreement with the Commission). Any state regulation under Section 274, however, must be compatible with Commission programs concerning protection against radiation hazards. See 42 U.S.C. 2021(g). Nothing in Section 274, or in the Washington Section 274 agreement, in any way authorizes an individual state to enact discriminatory bans on the interstate commerce of radioactive waste for storage purposes, and such action is plainly at odds with the purposes of the Atomic Energy Act of 1954. See generally 42 U.S.C. 2013.

Petitioner nonetheless contends (Pet. 16-19) that Congress authorized state action such as Initiative 383 in the Low-Level Radioactive Waste Policy Act, 42 U.S.C. (Supp. IV) 2021b *et seq.* This claim is belied by the plain language of the statute on which petitioner relies.

The Act authorizes the states to enter into interstate compacts to manage low-level waste disposal on a regional basis. 42 U.S.C. (Supp. IV) 2021d(a)(2)(A). Only after January 1, 1986, however, may compacts restrict the use of their regional compact facilities to the disposal of low-level radioactive waste generated within the region. 42 U.S.C. (Supp. IV) 2021d(a)(2)(B). This delay affords the states the time necessary to make appropriate arrangements *before* they are excluded from low-level waste sites. Because the Act nowhere authorizes states to begin excluding low-level waste now, the courts below correctly concluded that Initiative 383 is preempted by existing federal statutes regulating radiation hazards.[5]

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[5]On January 7, 1983, the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201, became law, further evidencing Congress' present intention to preempt the field of radiation hazards. That statute, however, deals primarily with the disposal of high-level radioactive waste (but see Section 151, 96 Stat. 2244), and while Initiative 383 purported to bar high-level as well as low-level out-of-state waste from

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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storage or transportation for storage within the State, petitioner no longer claims that the State may regulate the transportation or storage of high-level waste. See Pet. i n.1; Pet. Supp. [redacted] App. A-24.

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